STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

THREE EMPIRE STATE PLAZA, ALBANY, NY 12223-1350

Internet Address: http://www.dps.state.ny.us

January 18, 2005

Hon. Marlene H. Dortch
Secretary
Federal Communications Commission
The Portals II
445 12th Street, SW
Washington, D.C. 20554

RE: Comments of the New York State Department of Public Service in the Matter of Independent Payphone Association of New York's Petition for Preemption and Declaratory Ruling Concerning Refund of Payphone Line Rate Charges; CC Docket No. 96-128.

Dear Secretary Dortch:

Enclosed please find the comments of the New York State Department of Public Service in response to the Commission's Public Notice issued on January 7, 2005 in the above-referenced proceeding.

Should you have any questions concerning this filing, please call me at (518) 474-7579.

Very truly yours,

Saul M. Abrams
Assistant Counsel

enc.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of

Independent Payphone Association of New York's Petition for Preemption and Declaratory Ruling Concerning Refund of Payphone Line Rate Charges	)))	CC Docket No. 96-128

The New York State Department of Public Service (NYDPS) submits these comments in response to the Federal Communications Commission's (Commission) Notice issued January 7, 2005. The Commission seeks comments on the Independent Payphone Association of New York's (IPANY) Petition for preemption and a declaratory ruling concerning refund of payphone line rate charges. Such petition alleges that the rulings of the State of New York contravene the Commission's payphone orders. IPANY's Petition also seeks a declaratory ruling that IPANY members are entitled to refunds of the tariffed payphone line rate charges they paid to Verizon from 1997 to date, to the extent those charges exceeded rates that comply with the Commission's new services test.

The NYDPS submits that: (1) IPANY's Petition seeking to preempt past State of New York rulings and seeking refunds is an impermissible collateral attack on the decision of the New York Appellate Division which upheld the New York Public Service Commission's (NYPSC) interpretation of Commission decisions and denied IPANY refunds; (2) there is no basis for the Commission to preempt ongoing activities before the NYPSC; and (3) there is no basis to preempt past New York State rulings because they do not contravene the new services test.

1. IPANY Petition is an Impermissible Collateral Attack

IPANY's Petition is an impermissible collateral attack on the decision of the New York State Supreme Court, Appellate Division, which upheld the NYPSC's interpretation of Commission rulings and denied refunds to IPANY. In the fall of 1996 the Commission issued a Report and Order adopting revised regulations for payphone services.[1] As a result, the NYPSC instituted a proceeding to address and implement the requirements of the regulations.[2] In the spring of 1997 the NYPSC approved Verizon's tariff filing to modify its payphone service offerings in compliance with the new federal requirements, effective April 1, 1997.[3] On December 12, 1999, IPANY filed a Petition seeking permanent rates and arguing that current rates were excessive and must be reduced because they fail to meet the new services test. In the fall of 2000, the NYPSC issued an Order rejecting the Petition and continuing Verizon's rates for public access lines (PAL) and other payphone services at current levels.[4] On December 8, 2000, IPANY filed a Petition for Rehearing of the October 12, 2000 Order, claiming the Order was inconsistent with federal law and NYPSC precedent. On September 21, 2001, NYPSC issued an Order Denying Petition for Rehearing of October 12, 2000 Order and denying all relief to IPANY.

Thereafter, IPANY challenged the NYPSC determinations by commencing a proceeding before the State of New York's Supreme Court (the trial level court). Two Supreme Court

[1] FCC 96-388, Report and Order in CC Docket Nos. 96-128 and 91-35 (released September 20, 1996).

[2] Cases 96-C-1174 and 93-C-0142, Order Instituting Proceeding (issued December 31, 1996).

[3] Case 96-C-1174, Order Approving Tariff On a Temporary Basis (issued March 31, 1997).

[4] Cases 99-C-1684 and 96-C1174, Order Approving Permanent Rates and Denying Petition for Rehearing (issued October 12, 2000).

rulings were issued which were subsequently reviewed by petition to the Appellate Division of the New York State Supreme Court. That review resulted in a determination that the NYPSC had properly interpreted Commission directives, and had properly denied refunds to IPANY. Further, IPANY petitions for rehearing and for permission to appeal to the New York State Court of Appeals (highest court) were denied, ending all court challenges to the NYPSC decisions. IPANY now seeks to overturn the NYPSC decisions and all of the court rulings by impermissibly collaterally attacking those rulings through a petition to the Commission.

Collateral estoppel precludes IPANY from relitigating each of the issues it raises in this petition. Each issue IPANY presents to the Commission, in particular the availability of refunds based on the Commission's 1997 Refund Order (Petition, pp. 5-6) and the prospective nature of the Wisconsin Order, was (1) raised and decided conclusively by the New York State Supreme Court, Appellate Division; and (2) necessary in deciding the prior proceeding. (See IPANY v. PSC, attached as Petition Exhibit I). In Montana et al v. United States, 440 U.S. 147, 153 (1979) the Court said: "Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based upon a different cause of action involving a party to the prior litigation." In Winters v. Lavine, 574 F.2d 46, 56-58 (2d Cir. 1978), the court said that the laws of collateral estoppel and res judicata of the state in which the case was brought apply, and even if a state court has passed on federal law, issue preclusion will apply. Finally, in Town of Deerfield, N.Y. v. F.C.C., 992 F.2d 420, 428-429 (2d Cir. 1992), the court stated that the FCC may not act as forum of last resort and reverse court decisions, and federal courts must accord state judgments "full faith and credit" accorded by state law to questions of fact and law. Accordingly, the Commission should not entertain IPANY's Petition.

2. There is No Basis to Preempt Prospective Application of New Services Test

IPANY claims that the Commission should enforce its Payphone Orders against Verizon, determine new services test-complaint rates for Verizon, and require Verizon to make refunds back to 1997. However, there is no basis for Commission preemption of ongoing activities before the NYPSC which are in compliance with the Wisconsin Order.[5] On March 17, 2003, a group of independent payphone providers filed a complaint with NYPSC, contending that the Wisconsin Order clarified questions concerning the application of the new services test and confirmed that Verizon's PAL rates did not meet that test. On April 17, 2003, the NYPSC issued a notice directing Verizon to file cost studies and appropriate tariff provisions that demonstrate compliance with the new services test. Subsequently, a pre-hearing conference was held before an administrative law judge (ALJ), many informal discussions have taken place among the parties, substantial discovery has occurred, and briefing papers have been submitted to the ALJ, whose ruling on methodological issues has just been issued.

In conjunction with that ruling, the ALJ issued for comment a white paper prepared by a NYDPS Staff Advisory Group which has participated in the evaluation of the submissions. That white paper adheres to the Commission directives provided by the Wisconsin Order and sets forth proposed PAL rates fully in compliance with the new services test. Thereafter, parties will have an opportunity to comment on the white paper. All rates resulting from this process and submitted to the NYPSC for approval will be designed to meet the new services test. Accordingly, there is no basis for the Commission to preempt the ongoing NYPSC activities, and

[5] In the Matter of Wisconsin Public Service Commission: Order Directing Filings/CPDNOP.00-01, Memorandum Opinion and Order (released January 31, 2002)(Wisconsin Order). In this Order the Commission directed that a forward-looking methodology be used to develop the direct costs of payphone line services (p. 16), and usage (p. 20), and that an offset must be given for the Subscriber Line Charge (SLC) (p. 20) [or End User Common Line Charge (EUCL), in New York].

there is no basis to conclude that they are not proceeding in full compliance with Commission directives.

3. There is No Basis to Preempt Past Application of New Services Test

The Commission should reject IPANY's collateral attack on prior NYPSC and court decisions. Beyond that, there is no basis for the Commission to preempt past NYPSC rulings because they properly applied Commission directives as set forth in the Wisconsin Order. The NYPSC has asserted to the New York Courts that its rulings, and the rates therefrom, meet the new services test because they cover the direct cost of providing service plus a reasonable amount of overhead. There has never been a determination that NYPSC rates do not comply with the new services test.[6] Further, the Wisconsin Order was issued after the NYPSC acted and the Commission did not require retroactivity, notwithstanding IPANY's claim.

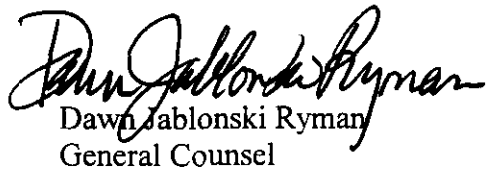
In the Wisconsin Order the Commission recognized the existence of various state practices concerning the application of the new services test and sought to clarify what was required by that test. The Order did not criticize the other state practices nor did it require retroactive relief. Clearly, the Wisconsin Order has prospective application only. Included in that Order were the findings that the new services test should apply to usage, and that an offset should be applied against the Subscriber Line Charge (SLC) [or End User Common Line Charge (EUCL), in New York]. The prospective nature of the Wisconsin Order is exemplified by the

[6] Court review of NYPSC's decision did not find that the rates failed to meet the then-applicable new services test. Rather, the Court focused on the language of the NYPSC Order and found that it did not adequately demonstrate that rates were forward looking. Although the NYPSC argued to the Court that its rates always met the new services test, these additional justifications by the NYPSC were not included in its Order, and could not be considered by the Court. The NYPSC decision was remanded by the Trial Court for a more complete finding concerning new services test compliance. As the Appellate Division later denied IPANY's request for refunds, and leave to appeal to the Court of Appeals was denied, the refund remedy was removed, and the parties and NYPSC focused their resources on setting prospective rates.

following direction: "At whatever point in time a state reviews a BOC's [Bell operating company] payphone line rates for compliance with the new services test, it must apply an offset for the SLC [EUCL] that is then in effect." (¶ 61). While not required to be followed in the earlier NYPSC decisions, that directive is being fully complied with in the current NYPSC proceeding.

For the above reasons, NYDPS urges the Commission to reject IPANY's request for an Order of preemption and declaratory ruling authorizing refunds. The current NYPSC proceeding is moving forward in compliance with Commission directives concerning the new services test. IPANY has exercised its full range of available legal remedies and cannot now seek to collaterally attack those decisions through a petition to the Commission. IPANY's Petition should be denied in all respects.

Respectfully submitted,



Dawn Jablonski Ryman
General Counsel

Saul M. Abrams
Assistant Counsel
Public Service Commission
of the State of New York
Three Empire State Plaza
Albany, New York 12223-1350
(518) 474-2510

Dated: January 18, 2005